

# A Line in the Sand: The ‘Strict Observance’ of International Law in the Western Sahara Case

---

**VB** [verfassungsblog.de/a-line-in-the-sand-the-strict-observance-of-international-law-in-the-western-sahara-case/](https://verfassungsblog.de/a-line-in-the-sand-the-strict-observance-of-international-law-in-the-western-sahara-case/)

Joris Larik Fr 2 Mrz 2018

Fr 2 Mrz 2018

On 27 February 2018, the Court of Justice of the EU handed down its judgment in Case C-266/16 Western Sahara Campaign UK v Commissioners for Her Majesty’s Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs. This decision is the latest milestone in the Court’s case law regarding the use of Article 3(5) TEU and its reference to the EU’s commitment to the “strict observance” of international law, revealing an interpretive-prohibitive function of the EU’s codified foreign policy objectives.

This is not the first time that the CJEU was confronted with the situation in Western Sahara, a non-self-governing territory over which Morocco largely exercises control, but which is opposed by the Front Polisario national liberation movement. In Case C-104/16 P Front Polisario, the Court had already concluded that the EU-Morocco Association Agreement was not applicable to the territory of Western Sahara. However, in that judgment the CJEU did not make reference to Article 3(5) TEU.

In Western Sahara, the CJEU drew on Article 3(5) TEU as a lens through which to interpret a set of international agreements between the EU and Morocco relating to fisheries. Viewed jointly and taking into account the Union’s wider international legal commitments, the Court concluded that these agreements were not “applicable to the waters adjacent to the territory of Western Sahara” (para. 85). EU legislation implementing these agreements, therefore, was upheld as valid.

## The Western Sahara case

---

The judgment followed a request for a preliminary ruling from the High Court of Justice for England and Wales in a case brought by the Western Sahara Campaign UK. The case concerns the validity of the Association Agreement and Fisheries Partnership Agreement (including its 2013 Protocol) between the EU and Morocco, as well as the EU implementing legislation.

The applicant claimed that these instruments were invalid because by their application to Western Sahara and the waters off its coast, they violated Article 3(5) TEU. More specifically, ‘the inclusion of that territory and those waters within their territorial scope is manifestly incompatible with international law and, more specifically, with the right to self-determination’ (para. 32). Moreover, the applicants noted, these international agreements ‘were not concluded on behalf of the people of Western Sahara’ and no evidence had been furnished ‘that the people of Western Sahara have derived any benefit from’ them (para. 32).

Given the 2016 *Front Polisario* judgment, which had been delivered after the request for a preliminary ruling in the present case was made, only two questions remained to be answered: First, whether the Fisheries Partnership Agreement was ‘valid, having regard to the requirement under Article 3(5) TEU to contribute to the observance of any relevant principle of international law’; and second, whether the applicant was ‘entitled to challenge the validity of EU acts based on alleged breach of international law by the EU’ (para. 41).

In its answer to the first question, the CJEU refocuses it on the implementing legislation (para. 52). It then observes that this question is premised on an interpretation of the Fisheries Partnership Agreement and the 2013 Protocol that would permit the exploitation of resources in the waters adjacent to the territory of Western Sahara. This, in turn, raises the question of whether ‘those waters are included with the territorial scope of both that agreement and that protocol’ (para. 53). Regarding the territorial scope, the CJEU stresses that it will have to take into account customary international law, in particular the Vienna Convention on the Law of Treaties, and the UN Convention on the Law of the Sea (UNCLOS), to which the EU is a party (para. 58).

Noting the interrelatedness of the EU’s different agreements with Morocco, the CJEU rules that the interpretation of the concept of the territory of Morocco applied to the Association Agreement in the 2016 *Front Polisario* judgment should also extend to Fisheries Partnership Agreement, i.e. ‘the geographical area over which the Kingdom of Morocco exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as that of Western Sahara’ (para. 62). By contrast, if Western Sahara were included, this ‘would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression’ (para. 63).

Building on this finding and drawing also on UNCLOS, the CEJU finds that therefore ‘the waters adjacent to the territory of Western Sahara are not part of the Moroccan fishing zone’ referred to in the Fisheries Partnership Agreement (para. 69). No ‘special meaning’, moreover, could have been accorded by the parties in order to include these waters, given that the ‘European Union could not properly support any intention of the Kingdom of Morocco to include, by such means, the waters in question within the scope of that agreement’ (para. 71). The same applies to the 2013 Protocol, seeing that it is an ‘integral part’ of the Fisheries Partnership Agreement.

Since this refutes the premise of the first question, the CJEU concludes that there is nothing to cast doubt on the validity of the implementing legislation. Given this outcome, the Court sees no need to proceed with the second questions concerning standing.

## Article 3(5) TEU as an interpretive lens

---

This judgment yields three observations about the use of Article 3(5) TEU in the CJEU’s case law. First, it reveals the use of that article, in particular its reference to the ‘strict observance’ of international law, as a constitutional norm that restricts the scope of action of the EU. In the judgment in Case C–366/10 *Air Transport Association of America*, the

Court already used this reference as a textual basis for its finding that the EU is bound by customary international law. In *Western Sahara*, Article 3(5) TEU is used to furnish interpretations conforming to important cross-cutting international norms such as the UN Charter and self-determination. This means that when the EU makes international agreements and implements them, its scope is not only limited by the competence allocation and procedures in its own primary law but also to by fundamental features of the international legal order.

This fleshes out further the interpretative-prohibitive function of constitutional foreign policy objectives. Normally, such norms fulfil an interpretive-permissive function, meaning that they tend to be used by institutional actors to justify extensions of their own powers (e.g. restricting fundamental rights in the quest for security). In the particular case of the EU, they have also been used—successfully—in legal basis disputes, such as the Council's argument in *Case C-130/10 Parliament v Council (Al-Qaeda sanctions)* that the reference in Article 21(2)(c) TEU to 'peace and international security' justified targeted sanctions to combat terrorism falling under the CFSP.

Secondly, the *Western Sahara* case makes clear that this prohibitive force remains limited in the field of external relations. What the applicants had asked for was a ruling also on the validity of the international agreements. The Court, however, redirected the question to the validity of the implementing legislation based on an interpretation of the agreements that would respect international law in the widest sense. Hence, the CJEU favoured an approach which ensured continuity in international legal relationships and showed some deference to the EU's 'political branches' in the conduct of its external action. The prohibitive effect is nonetheless present, more operated more subtly: What the court says here between the lines is that any interpretation practiced by the EU that violates core international norms such as self-determination would not only possibly entail responsibility in the international legal arena, but could amount to a violation of EU primary law.

Third, looking to the future, taking *Western Sahara* and *Kadi* together, a policy space of 'acceptable international behaviour' in the eyes of the CJEU is created. Its boundaries are still blurry, but they have become clearer. On one side, as per *Western Sahara*, there are situations where manifest violations of cardinal international norms (such as self-determination) would also amount to a violation of primary law in the form of Article 3(5) TEU. On the other side, as per *Kadi*, there are situations where compliance with cardinal international obligations (such as UN Security Council Resolutions) would amount to violations of arguably even higher-ranking 'structural principles' of EU constitutional law (such as fundamental rights protection).

In sum, *Western Sahara* was about drawing lines in the sand not only geographically but also constitutionally. It is between the 'strict observance' of core principles of international law and the 'even stricter observance' of the EU's constitutional principles that the organs charged with the EU's external relations will need to operate.

---

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Larik, Joris: *A Line in the Sand: The 'Strict Observance' of International Law in the Western Sahara Case*, *VerfBlog*, 2018/3/02,

<https://verfassungsblog.de/a-line-in-the-sand-the-strict-observance-of-international-law-in-the-western-sahara-case/>.